Supreme Court, U.S.
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No. 95-848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARTHA SABOL WRIGHT AND JOHN C. WRIGHT, JR.,
Petitioners,

v.

METROHEALTH MEDICAL CENTER,
PETROLEUM HELICOPTERS, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

(1) The decision of the Sixth Circuit in the instant case conflicts with the recent December 20, 1995 decision of the Eleventh Circuit in *Shahar v. Bowers*, 70 F. 3d 1218 (11th Cir. 1995). The plaintiff in *Shahar* had been offered a job by the Georgia Department of Law, but the offer was withdrawn when the Department learned that Shahar intended to "engage in a marriage ceremony" with her long time companion. 70 F. 3d at 1219. The circumstances in *Shahar* were further removed than the instant case from the rights recognized in *Zablocki v. Redhail*, 434 U.S. 374 (1978), because Shahar and her companion were both women, and thus under Georgia law the ceremony in question did not constitute a civil marriage. 70 F. 2d at 1222.

The Eleventh Circuit, citing *Zablocki*, held nonetheless that the denial of employment in *Shahar* was subject to strict scrutiny:

> the court holds . . . that *strict scrutiny* must be utilized. . . . The court believes that the general standard of *strict scrutiny* is applicable to Shahar's intimate association claim and that the acts of the Attorney General must be deemed to infringe on Shahar's rights unless shown to be narrowly tailored to serve a compelling

> governmental interest. . . . Marriage in the conventional sense is an intimate association significant burdens on which are subject to *strict scrutiny*. *Zablocki v. Redhail*. . . .
>
> . . . Shahar's intimate association rights were violated . . . . The . . . claim . . . is [remanded] to the district court for it to determine under *strict scrutiny* whether this violation infringed Shahar's constitutional rights.

70 F. 3d at 1224-26(Emphasis added); see *id*. at 1227 (Morgan, J., concurring)("I concur . . . that Shahar's rights of intimate . . . association have been burdened and that *strict scrutiny* is the proper test to apply.")(Emphasis added).

The Eleventh Circuit has thus adopted the very strict scrutiny standard rejected by the Sixth Circuit in the instant case, and has extended to homosexual marriages in the Eleventh Circuit the very constitutional protection denied to traditional marriages in the Sixth Circuit.

(2) Respondent disputes our characterization of several of the appellate decisions which conflict with the decision of the Sixth Circuit in the instant case.

Respondent asserts that the Eighth Circuit in *Espinoza v. Toma*, 580 F. 2d 346 (8th Cir. 1978), "expressly adopted a *rational basis* test." (Br. Op. 12)(Emphasis in original). The text of that opinion, however, makes clear that the Eighth

Circuit requires an anti-nepotism rule to satisfy a "reasonable[ness]" standard as well as the less stringent "rational basis" requirement.[1] Respondent maintains that in *Sioux City Police Officers' Association v. City of Sioux City*, 495 N.W. 2d 687 (Iowa 1993), "the state court *did* use a rational basis test . . . . "(Br. Op. 13)(Emphasis in original). Respondent provides no explanation or reference for this assertion; the text of the opinion, set out in a note below, does not mention the rational basis test, but instead applies a form of intermediate scrutiny including a requirement of narrow tailoring.[2]

Respondent seeks to distinguish *Bretz v. City of Center*

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[1]580 F. 2d at 348-49: "'A classification "must be reasonable . . . and must rest upon some ground of difference having a fair and substantial relation to the subject of the legislation . . . " '. . . We must, therefore, consider the purpose of the . . . policy and whether the classification utilized to carry out the policy is *reasonable* . . . *and* has a rational relationship to the policy sought to be advanced by its operation. . . . We are satisfied that . . . the preclusion of spouses [in this case] is a *reasonable* classification which bears *a fair and substantial relationship to the objectives of the policy.*" (Emphasis added).

[2]495 N.W. 2d at 697: "[T]he instant anti-nepotism policy is like the policy upheld in *Winrick v. City of Warren* . . . . The court applied the 'middle-level scrutiny' of equal protection analysis, asking whether the anti-nepotism provision had a fair and substantial relationship to a laudable legislative purpose. . . . . The anti-nepotism policy in the case at bar forwards an *important* governmental objective . . . and . . . is *narrowly drawn*. . . . We find that the . . . policy is a legitimate regulation of the city employment environment and is *narrowly drawn* so as not to impermissibly invade the employee's freedom of association."

Line, 276 N.W.2d 617 (Ct. App. Mich. 1979), as "a First Amendment overbreadth analysis." (Br. Op. 14). In fact, however, the opinion in *Bretz* contains no mention of the First Amendment, instead citing *Reed v. Reed's* "fair and substantial relation" standard. 276 N.W. 2d at 618. Similarly, respondent asserts that the plaintiff in *Morfin v. Albuquerque Public Schools*, 906 F. 2d 1434 (10th Cir. 1990), prevailed on a "First Amendment freedom of association claim." (Br. Op. 13). In fact, however, the Tenth Circuit actually rejected Morfin's First Amendment claim[3], and upheld her complaint only because it also asserted that the school board had taken action which constituted "unreasonable governmental interference" with her "marital relationship." 906 F.2d at 1439 (*citing Zablocki v. Redhail.*)

Respondent notes that the defendants ultimately prevailed in *Winrick v. City of Warren*, 299 N.W.2d 27, 99 Mich. App. 770 (1980), and *Hamilton v. Board of Trustees of Oconee*

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[3]906 F. 2d at 1439-40: "Morfin . . . argues that she exercised a First Amendment right to associate with [her husband] in support of his First Amendment activities . . . . Morfin's claim fails . . . . Both defendants were entitled to summary judgment on plaintiffs' free speech claims . . . [Defendant] Davenport . . . was entitled to summary judgment on . . . Morfin's First Amendment association claim, but not on Morfin's marital association claim."

County, 319 S.E.2d 717 (S.C.App. 1984). (Br. Op. 14). But respondent does not deny that in both instances the state courts applied a form of heightened scrutiny flatly inconsistent with the decision of the Sixth Circuit in the instant case.

(3) With regard to petitioner John Wright's discharge claim, respondent objects somewhat paradoxically that "the parties have had no ability to develop any record on this issue." (Br. Op. i). But there is and could not be any "developed evidence" on this claim *because* respondents prevailed below on their contention that adverse employment actions based on marital status simply are not subject to any form of heightened scrutiny under the Constitution. We seek review of the decision of the Sixth Circuit precisely because it precludes petitioners from litigating in either federal court or state court their claim that petitioner John Wright was dismissed as a consequence of his marriage to petitioner Martha Sabol Wright.

Respondent contends that factual allegation underlying petitioner John Wright's discharge claim is a "demonstrably false assertion." (Br. Op. 4). Petitioners do not ask this Court, however, to address the factual issues raised by respondent's denial, but seek only a decision that their allegations state a claim on which relief can be granted, and that petitioners are

thus entitled an opportunity to prove at trial the allegations of this claim.

(4) On December 29, 1995, the Sixth Circuit issued the following directive in *Wright v. Petroleum Helicopters* (CA No. 95-4260), the appeal of the 1995 district court decision dismissing petitioner John Wright's discharge claim:

> It appearing that this appeal is controlled by the precedent in this Court's decision in *Wright, et al*, v. *MetroHealth, et al*, Ca No. 94-3548, and pursuant to Rule 18, Rules of the Sixth Circuit, this matter will be *held in abeyance* pending the decision of the United States Supreme Court in Plaintiff-Appellant's petition for certiorari in *Wright, supra*.[4]

The court of appeals understandably regards this most recent appeal as controlled by its earlier July 13, 1995; should this Court grant certiorari to review that July 1995 opinion, it would be appropriate also to grant certiorari before judgement in *Wright v. Petroleum Helicopters*, so that these inextricably interrelated claims governed by the same standard can be resolved in a single proceeding.

CONCLUSION

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[4]Letter to Counsel from Deborah H. Ginocchio, Sixth Circuit Conference Attorney, December 29, 1995. (Emphasis in original). Sixth Circuit Rule 18(d) authorizes the entry of such a "pre-argument conference order."

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit and to review before the judgment the appeal now pending in the Sixth Circuit *sub nom. Wright v. Petroleum Helicopters, Inc.*.

Respectfully submitted,

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